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271-301—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 307

PERRY PUBLICATIONS, INC., PALM BEACH POST-TIMES AND PENSACOLA NEWS JOURNAL DIVISIONS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–2) is reported at 375 F. 2d 118. The decision and order of the Board (R. 119–214, 241–246)[2] are reported at 151 NLRB 1030.

[1] West Palm Beach Typographical Union No. 709 and Pensacola Typographical Union No. 293 (affiliates of the International Typographical Union, AFL–CIO) filed the underlying charges in these proceedings and intervened before the court of appeals; they are therefore respondents here.

[2] "R." refers to the transcript of record (Volume I), and "J.A." to the joint appendix, in the court below.

JURISDICTION

The decision of the court of appeals issued on March 27, 1967 (Pet. App. A–1), a petition for rehearing was denied on May 25, 1967 (Pet. App. A–21), and a decree was entered on June 20, 1967 (Pet. App. A–26). The petition for a writ of certiorari was filed on June 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that the employer failed to bargain in good faith with the union, in violation of Section 8(a) (5) and (1) of the National Labor Relations Act, and discriminated against five employees in order to discourage union membership, in violation of Section 8(a) (3) and (1).

2. Whether the Board deprived the employer of due process of law by consolidating a case involving one of the employer's divisions with a case involving another division.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth on pp. A–32 to A–42 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. BARGAINING NEGOTIATIONS

Petitioner publishes both the Palm Beach Post-Times, whose composing room employees are repre-

sented by Local 709, and the Pensacola News Journal, whose composing room employees are represented by Local 293 (R. 122–123, 139; J.A. 10–11, 62–63, 705). Petitioner's principal labor relations representative at both papers is Labor Relations Consultant Lemons (R. 123; J.A. 703); International Representative Bingel is a principal representative for both Locals (J.A. 10–11, 63).

A contract between petitioner and Local 709 at the Post-Times expired in November 1960 (R. 123; J.A. 11). Between then and January 1963, the parties engaged in negotiations for, but failed to reach, a new agreement. During that period, petitioner acquired new, automated equipment to perform work previously performed by union journeymen on less sophisticated equipment (R. 125–129; J.A. 21–23, 27–29, 36, 362–363, 834–835, 911–914, 1026–1027, 1037, 1058). Although union journeymen were also able to operate the new equipment, petitioner hired, for this equipment, new, nonunion employees, to whom it assigned new job classification titles ("computer typists," "console operators," "photocomposer operations," and "offset preparatory employees") (R. 126–129, 132; J.A. 14–19, 24–26, 29–30, 40–41, 146, 148–149, 155–159, 327–330, 447–450, 452–453, 834–835, 838–840, 888–891). Moreover, petitioner sought to amend the "jurisdictional" clause in the expired contract, which defined the unit of employees represented by Local 709, so as to exclude

these new job classifications; Local 709 resisted this effort (R. 130–131; J.A. 43–48, 143–149, 888–892).[3]

Contract negotiations continued into 1963. On January 30, September 6, and October 24, 1963, Local 709 requested a list of all employees performing work within its jurisdiction, including those in the new job classifications; the October request also asked for the wage scales of those classifications (R. 132, 138, 141–142; J.A. 46–49, 238, 322–325, 1336, 1342–1343, 1432–1433). Petitioner refused to supply this information, on the ground that the new employees were not performing work within Local 709's jurisdiction (R. 132, 138, 142; J.A. 47–49, 238, 322–325, 846–850, 1337–1341, 1344). Although the jurisdictional issue was extensively discussed in bargaining sessions during this period (R. 131, 136, 141, 144; J.A. 23–30, 328–331, 322–326, 602–603, 1345, 1347–1348), petitioner's labor relations consultant, Lemons, refused to recognize Local 709 as bargaining representative for the new job classifications, stating that he reserved the right to decide when employees were in the bargaining unit and when they were not (R. 131, 136, 156; J.A. 322–326, 231–234, 23–30, 602–603, 1347–1348, 1562). Moreover, in June 1963, petitioner unilaterally reclassified certain machinists in the unit to a newly created job category, with a resulting loss of pay of $4.35 per week (J.A. 55–57; R. 134). When International Representative Bingel attempted to discuss the reclassi-

[3] To the extent that the foregoing events occurred prior to the six-month limitations period established by Section 10(b) of the Act, they were considered by the Board for background purposes only (R. 123–131). See *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411.

fication on Local 709's behalf, Lemons replied that the change was within "management's prerogative" (R. 135; J.A. 56). Finally, on October 22, Lemons told Local 709 that it would be impossible to negotiate a jurisdictional clause until unfair labor practice charges (which the Union had filed with the Board, see n. 4, *infra*) were withdrawn, or the Board had decided the jurisdictional issue (R. 141; J.A. 232–234).

Meanwhile, the contract between Local 293 and petitioner at the News Journal terminated on July 31, 1963 (R. 130; J.A. 62–63). At the first bargaining session, on October 16, Lemons advised Local 293 that new employees ("computer typists") would be hired to operate certain newly acquired automated machinery because petitioner did not consider this operation to be within Local 293's jurisdiction (R. 140; J.A. 197–199). When Local 293 questioned this assertion, Lemons replied that petitioner could not negotiate with Local 293 until the jurisdictional question had been determined by the Board on the charges which had been filed involving the Post-Times (R. 140; J.A. 198, 229).

By agreement, both Locals and petitioner met on October 28-31 in West Palm Beach, with one contract being discussed each morning and the other each afternoon (R. 142; J.A. 64–68, 238–239). Throughout these negotiations, Lemons maintained that petitioner could not negotiate the jurisdictional question with either Local until the Board had rendered a decision on the issue in the unfair labor practice case then pending against the Post-Times (R. 143; J.A. 65–67, 73, 78, 87). Lemons added that the contract with Local

293 would depend on petitioner's contract with Local 709 (R. 143; J.A. 67, 73–88). On October 31, Lemons stated that petitioner would not negotiate a contract with either Local until Local 709 dropped its unfair labor practice charges (R. 143–144; J.A. 81, 161, 207–208, 122). Although the Union pointed out that it could not guarantee that the Regional Director would dismiss the pending complaint, Lemons nevertheless stated that he wanted such a written guarantee from the Locals (R. 143–144; J.A. 81). At one point, Lemons requested the Locals to have the Board's Regional Office send an observer to "approve" the negotiations (R. 143; J.A. 249).

On November 1, the Locals submitted to Lemons a settlement proposal, which called for the execution of contracts covering both papers (R. 144–145; J.A. 85, 1345). Petitioner's counterproposal omitted reference to an agreement on collective bargaining contracts, petitioner again asserting that it would not negotiate a contract with either Local until all the unfair labor practice charges had been disposed of by the Board (R. 146; J.A. 89–90, 94–95, 1346). When Local 709's Vice-President Jensen (a discriminatee named in the charges) protested that petitioner's counterproposal for settlement of the claims of employees against whom the company had discriminated omitted back pay, Lemons withdrew the entire counterproposal and informed the Locals that, while he was now willing to accept their position on jurisdiction, he would require that all other issues be settled by the Board (R. 146; J.A. 91–92, 266). After International Representative Bingel assured Lemons

that the backpay issue was open to negotiation, Lemons reinstated petitioner's counterproposal, but stated that the Locals would have to secure dismissal of all pending unfair labor practice charges before petitioner would proceed to negotiate a contract (R. 146–147; J.A. 92, 96–100, 141, 142, 267).

On November 5, the parties agreed that all future meetings would be for the purpose of discussing contracts at both papers (R. 148; J.A. 210–211, 274–275). At that time, Lemons finally complied with Local 709's repeated requests for a list of the names and wages of employees in the four new job classifications; Lemons stated: "This will take care of our refusal to bargain charge." However, he again asserted that the Board would have to decide the pending unfair labor practice charges before petitioner could negotiate a contract (R. 149; J.A. 107–108, 271–272, 1349).

On November 6, the parties reached a full accord on a jurisdictional clause which included the four new job classifications (R. 149, 160–161; J.A. 112–113, 275, 286–288, 789). However, petitioner then insisted that the contract with the Post-Times employees contain provisions which had the effect of negating the agreement on the jurisdictional clause (R. 147, 150–152, 163; J.A. 81, 114–117, 121, 123–125, 191, 280, 806, 1349–1350, 1355–1356). When Bingel asked why petitioner's counterproposal related only to the Post-Times (R. 152–153; J.A. 125), Lemons replied that he could not discuss the News Journal contract because that contract and the jurisdiction of Local 293 were contingent upon

the Post-Times contract (R. 153; J.A. 125). Although the counterproposal included petitioner's first specific wage proposal in over two years of negotiations, Lemons stated that this was petitioner's "final proposal," and refused to engage in further negotiations (R. 152–153; J.A. 39–40, 125–126, 216–220, 138).

On November 9, Locals 709 and 293 called the employees out on strike. The membership of both Locals had previously authorized the strike because petitioner had conditioned bargaining upon a withdrawal of unfair labor practice charges filed with the Board. (R. 146–147, 153–154; J.A. 100–106, 208–210, 269–270, 1348, 1360–1361.)[4] The strike was still in progress at the time of the Board hearing in April and May 1964 (R. 153).

2. DISCRIMINATION AGAINST UNION MEMBERS

While the bargaining negotiations described above were occurring, petitioner engaged in acts of discrimination against individual union members. The facts concerning those incidents are as follows:

a. Jensen, Venis, and Highfield

In May 1963, Local 709 elected a new slate of officers who had campaigned on a platform of more aggressive unionism (R. 132–133; J.A. 315–319). The new officers promptly filed the unfair labor practice

[4] Local 709 first filed charges in July 1963; Local 293 filed additional charges on November 12, 1963; and, on December 12, 1963, both Locals filed further charges. On March 11, 1964, the General Counsel of the Board issued a consolidated complaint on all of the charges. Petitioner's motion to sever the case involving the Post-Times from that involving the News Journal was denied by the Trial Examiner. (R. 119–120, 81–84.)

charges noted above. Petitioner thereupon threatened to get rid of the "troublemakers" responsible for the charges, complained that the charges were "upsetting" it, and stated that, because a previous discharge of union adherents had not rid petitioner of the "troublemakers," it "was planning further house cleaning" (R. 133, 135; J.A. 60–61, 319–320, 655, 673–674).

Employee Jensen was one of the newly elected officers (R. 133; J.A. 60). Less than two weeks after his election, Jensen and others were unilaterally reclassified by petitioner, with a resulting wage decrease. Others who were affected quit their jobs, but Jensen accepted the reduction and attempted to correct it through the grievance procedure and collective bargaining (R. 134–135; J.A. 56–57). On Saturday, August 24, Foreman Calkins asked Jensen and union members Venis and Highfield to work overtime (R. 180–181; J.A. 339, 463, 489, 1237). All refused for personal reasons (R. 181; J.A. 342–343, 463, 489, 1175–1177). Calkins "accepted" the excuses tendered by Jensen and Venis, and did not comment about Highfield's refusal (R. 181; J.A. 339, 463, 489). Jensen and Venis pointed out that another employee still on duty when they left could fill in for them if necessary (R. 181; J.A. 339–342). The remaining employees were able to complete the work at about the usual hour (R. 192–194; J.A. 651–657, 662, 663, 1183–1190, 1207, 1123–1124, 512–520, 498–501, 341–342).

On Monday, August 26, during a grievance committee meeting, petitioner's representative, Lemons (who knew about the overtime incident) expressed irritation over the grievance activity of Jensen and

Local 709, but did not mention the refusal to work overtime (R. 136–137, 184; J.A. 343–349, 873, 875, 1556–1568). The next day, petitioner discharged Jensen and Venis on the asserted ground that they had refused "a direct order" to work overtime (R. 185, 348–351, 584, 1413, 1363). On September 11, the second day after her return from a two-week vacation, Highfield was told by Superintendent Dacus that he would "have to punish [her] in some way" for the overtime incident; and, he suspended her for one week (R. 187; J.A. 490–492). As a matter of policy and practice, petitioner does not require an employee to work overtime if he has an excuse which is deemed legitimate by the employee's immediate supervisor. Nor had any employee previously been disciplined for refusing to work overtime, regardless of the reason given. (R. 190–191; J.A. 465–466, 351, 392–394, 430–431, 422–433, 451, 452, 375, 499.)

b. Dulin

Dulin, a former officer of Local 709, was an employee with six and a half years of experience (R. 167; J.A. 539, 550). On April 21, 1963, Dulin—following established practice—attempted to clear a clogged aisle by pushing some wheeled tables which carried forms, each holding a page of set-up type (R. 168; J.A. 546–549). One of these forms fell off a table and the type became scrambled (*ibid.*). Three days later, petitioner discharged Dulin for "carelessness" (R. 169; J.A. 551, 1417–1418). The only other employee who had had a similar accident during Dulin's employment with petitioner had not been discharged (R. 171; J.A. 670–671, 550, 562). Dulin was replaced by a non-

union employee (R. 170; J.A. 568). Petitioner offered to reemploy Dulin in its composing room during the strike, but he refused to cross the picket line (R. 170; J.A. 1419).

c. Miller

In May 1963, Arnold, who then supervised the tape room night shift, predicted that petitioner was going to eliminate the remaining union members from the tape room operation (R. 174; J.A. 527–528, 621, 633). About the same time, petitioner arranged for a series of secret tests of the production rate of Miller, who was one of the few union members still employed in the tape room (R. 173–174; J.A. 618–620, 866–872, 1088–1089). The tests revealed what was already well known—that Miller was one of the slower workers, although she was a conscientious employee who produced very high quality work (R. 173–174; J.A. 526, 617, 625–626, 867–868, 1102, 1103). Thereafter, and on the heels of a threat that if Local 709 pressed its charges several Post-Times positions might be eliminated, petitioner discharged Miller, who had been employed for about 12 years, without any prior warning (R. 173; J.A. 522–523). Subsequent to Miller's discharge Arnold announced to the nonunion tape room employees that if they joined the Union "they would be fired" in accordance with "company policy" (R. 175; J.A. 634). During the strike, petitioner offered to rehire Miller in a nonunion job, but she refused (R. 243; J.A. 528, 1417).

d. Weymark

In June 1963, petitioner granted Weymark a leave of absence, with the understanding that he would return to work on September 9, when fellow compositor Palumbo began his vacation (R. 196–197; J.A. 563–586, 588–589, 905, 1187). Weymark returned to work as scheduled, but, when Palumbo finished his vacation, Weymark, a Local 709 member, was laid off while petitioner retained nonunion compositor Martin (R. 198; J.A. 588). Martin had been hired during Weymark's leave of absence, although Weymark had given petitioner a self-addressed envelope to recall him if he were needed prior to September 9 (R. 196–198; J.A. 585–588).

B. THE BOARD'S CONCLUSION AND ORDER

The Board found that petitioner violated Section 8(a) (5) and (1) of the Act by, *inter alia,* negotiating with a fixed intention to prevent the consummation of any agreement with either Local 709 or Local 293, and by insisting that it could not negotiate with the Locals while unfair labor practice charges were outstanding. The Board further found that petitioner's bad faith bargaining caused the November 1963 strikes and rendered them unfair labor practice strikes from their inception, and that therefore the strikers were entitled to reinstatement on request, regardless of replacement. (R. 155–167.) In addition, the Board concluded that petitioner laid off Weymark, suspended Highfield, and discharged Dulin, Miller, Jensen, and Venis, for anti-union reasons, in violation of Section 8(a) (3) and (1) of the Act (R. 172, 195, 242–243). Finally,

the Board found that petitioner made threats violative of Section 8(a)(1) of the Act (R. 242, 201).

The Board ordered petitioner, *inter alia,* to cease and desist from the unfair labor practices found; to offer reinstatement to the discriminatorily discharged employees; to make them and the other employees discriminated against whole for any loss of pay; to bargain with the Union in good faith; to reinstate the strikers on application regardless of replacements and to make them whole for any loss of pay; and to post appropriate notices (R. 205–212, 244–246.)

C. THE DECISION OF THE COURT OF APPEALS

Observing in a *per curiam* opinion that "it would serve no useful purpose to delineate the evidentiary facts reflected in four printed volumes of the record," the court of appeals held that the Board's findings and conclusions were supported by substantial evidence, and that no legal error was shown. Accordingly, the court enforced the Board's order in full (Pet. A1–A2).

ARGUMENT

1. Petitioner's challenge to the Board's unfair labor practice findings raises only evidentiary issues which do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, the facts summarized in the Statement (*supra,* pp. 2–12), show that the court of appeals was amply warranted in finding substantial record support for the Board's findings with respect to petitioner's unlawful discriminations and failure to bargain in good faith.

2. As shown in the Statement (*supra*, pp. 2–3), the Post-Times and the News Journal are divisions of a single corporate entity, petitioner Perry Publications, and the contract negotiations regarding both newspapers were conducted by Lemons for petitioner and Bingel for both Locals. Moreover, petitioner's insistence on conditioning execution of a News Journal contract upon the resolution of issues in connection with the Post-Times brought about joint negotiations; those negotiations covered issues common to both newspapers and stemmed from petitioner's plan for use of its automation devices at both newspapers (*supra*, pp. 3–7). Under these circumstances, it is clear that the Board did not abuse its discretion in consolidating the cases involving petitioner's newspapers. See *National Labor Relations Board* v. *Local Joint Executive Board*, 301 F. 2d 149, 155–156 (C.A. 9). Nor has petitioner shown any prejudice to it by virtue of the consolidation.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
NANCY M. SHERMAN,
Attorney,
National Labor Relations Board.

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